IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHRISTINA ROMERO, Individually and	§	
GARY ADAN CRUZ, SR., Individually	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:17-cv-00427**
	§	
AMANDA BROWN, *et al.*,	§	
Defendants.	§	

DEFENDANTS CITY OF HOUSTON, SERGEANT ROBERT RUIZ, AND OFFICER ROLAND BENAVIDES' AMENDED MOTION TO DISMISS PURSUANT TO RULES 12(b)(6) AND 12(b)(1)

Defendants City of Houston ("City"), Sergeant Robert Ruiz ("Sergeant Ruiz"), and Officer Roland Benavides ("Officer Benavides") (collectively "Defendants") file this Amended Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim under Federal Rule of Civil Procedure 12(b)(6) and for Lack of Subject Matter Jurisdiction pursuant to Rule 12(b)(1), and would respectfully show the Court the following:

I. INTRODUCTION

Plaintiffs assert that on March 2, 2016, Sergeant Ruiz and Officer Benavides accompanied Amanda Brown, a social worker with the Texas Department of Family and Protective Services ("TDFPS"), to remove Plaintiffs' other three children pursuant to a Notice of Removal. (Dkt. 1, ¶¶ 33-34). On March 3, 2016, the 247th Judicial District Court of Harris County, Texas heard the matter and ordered TDFPS to return the children to Plaintiffs. (Dkt. 1, ¶ 40-41).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants ask the Court to dismiss Plaintiffs' causes of action under 42 USC § 1983 because Plaintiffs' Complaint falls well short of alleging facts entitling Plaintiffs to § 1983 relief. Pursuant to Federal Rule of Civil Procedure 12(b)(1), the City requests that the Court exercise its supplemental jurisdiction under 28 USC § 1367 and dismiss Plaintiffs' tort causes actions against Sergeant Ruiz and Officer Benavides – intentional infliction of emotional distress and abuse of process - because Plaintiff's election to file suit against the City mandates that the City employees, Sergeant Ruiz and Officer Benavides, be dismissed under the Texas Tort Claims Act's election of remedies doctrine, Section 101.106(e) of the Texas Civil Practices and Remedies Code. The City further asks the Court to dismiss Plaintiffs' remaining tort causes of action against it under Rule 12(b)(1) because the City is immune from intentional infliction of emotional distress and abuse of process to Federal Rule 12(b)(1).

II. MOTION TO DISMISS UNDER RULE 12(b)(6)

A. Standard of Review

In accordance with Federal Rule of Civil Procedure 12(b)(6), a defendant may move for dismissal of a complaint that fails to state a claim for which relief can be granted. A complaint must contain enough facts to state a claim to relief that is plausible on its face to survive a Rule 12(b)(6) challenge. *Bell Atlantic v. Twonbly*, 550 U.S. 544, 555 (2007). In deciding a motion to dismiss, the court takes all factual allegations contained in the complaint as true and resolves any ambiguities or doubts regarding sufficiency of the claim in favor of the plaintiff. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). A plaintiff may provide a generalized statement of facts; however, there must be sufficient information to outline the elements of the claims. *Matta v. May*, 888 F.Supp. 808, 813 (S.D. Tex. 1995) (citing *Ledesma for Ledesma v. Dillard Dep't Stores, Inc.*, 818 F.Supp. 983, 984 (1993)). If a complaint does not include facts supporting "pivotal elements" of the claim, the Court may assume the nonexistence of such facts. *Id*. A court is generally limited to the allegations of the complaint and the documents either attached to or incorporated in the motion. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996). The complaint must contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 617 (5th Cir. 2012).

B. Plaintiffs' claims against the City under 42 U.S.C. § 1983 should be dismissed

To prevail on a claim under Section 1983, a plaintiff must show: (1) the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws; (2) by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986). Plaintiff has suit the City of Houston, Sergeant Ruiz, and Officer Benavides in this matter.

A municipality may only be liable under § 1983 if the execution of one of its customs or policies deprives a plaintiff of his constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The "heightened pleading requires allegations of fact focusing specifically on the conduct of the individual who caused the plaintiff['s] injury." *Reyes v. Sazan*, 168 F.3d 158, 161 (5th Cir. 1999). The municipality is not vicariously liable under § 1983 for its employees' actions. *Monell*, 436 U.S. at 691. In order to impose liability on the City, Plaintiffs must prove that "action pursuant to official municipal policy" caused his injury. *Id.* Official municipal policies include the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. *See Pembaur v. Cincinnati*, 475 U.S. 469, 480-81 (1986); *Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970).

1. Plaintiffs have failed to state plausible factual allegations on an approved policy, practice, custom, deliberate indifference, or moving force

a) Elements necessary for governmental liability not met

For Plaintiffs' claims against the City to survive, Plaintiffs must sufficiently plead facts that would support an actionable claim against Defendants. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). Governmental liability under 42 U.S.C. § 1983 requires Plaintiff to plead and prove three primary elements including: "(1) a policymaker; (2) an official policy; (3) and a violation of constitutional rights whose 'moving force is the policy or custom." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citing *Monell*). Plaintiffs do not allege that the City directly violated Plaintiffs' constitutional rights, but rather that a policy, practice, custom or the lack of or inadequacy thereof allowed employees to do so. "[R]igorous standards of culpability and causation must be applied to ensure that the [governmental entity] is not liable solely for the actions of its employees." "The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts." *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997).

Plaintiffs fail to allege facts showing that there is a custom or policy employed by the City that is "persistent," "often repeated," or "constant" as is generally required for municipal liability under 42 U.S.C. § 1983. *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984). Plaintiffs' Complaint does not allege factual customs or policies adopted by the City that were deliberately indifferent to Plaintiffs' constitutional rights as required for liability under 42 U.S.C. § 1983. Rather, Plaintiffs assume they must exist because of the alleged "violations" of their constitutional rights. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389-90, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *see also Gonzales v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 757 (5th Cir. 1993).

b) No Municipal liability under Respondeat Superior

A municipality is only held to be liable under §1983 if the action pursuant to an official municipal policy of some nature caused a constitutional tort. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690-691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Supreme Court has held that "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Id.* at 694. In requiring the existence of an official policy or custom before municipal liability under §1983 can attach, the Supreme Court "intended to distinguish acts of the *municipality* from the acts of the *employees* of the municipality, and thereby make clear that municipal liability to the action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)(emphasis in original). A municipality is only liable under §1983 for acts that are "directly attributable to it 'through some official action or imprimatur.'" *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009).

Here, Plaintiffs have not stated any facts supporting claims of constitutional violations by the City. Instead, they have provided a conclusory laundry list of supposed violations and/or what the City's duties are to be, including the obligation to promulgate policies – which Plaintiffs claim the City lacked at the time of the alleged violation. (Dkt. 1, ¶¶ 61-63). However, Plaintiffs do not state what the City specifically did to violate their rights.

Plaintiffs' conclusions, allegations, and conclusory statements do not state enough to avoid dismissal under a 12(b) standard. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). There is nothing in Plaintiffs' recitation of the facts that would show that the City has engaged in any practice that would be the *moving cause* of a deprivation of Plaintiffs' constitutional rights. As such, the City asks that Plaintiffs' claims be dismissed.

c) No failure to train or supervise – No deliberate indifference and moving force

To the extent Plaintiffs are attempting to assert a failure to train or failure to supervise claim against the City, Plaintiffs must show that (1) there was a policy or custom of providing inadequate training or supervision; (2) that shows the municipality's deliberate indifference; and (3) that the inadequate training or supervision was a "moving force" behind the violation of the plaintiff's rights. *Baker v. Putnal*, 75 F.3d 190, 200 (5th Cir. 1996), citing *City of Canton*, 489 U.S. at 390. Plaintiffs do not, and cannot realistically, suggest that training provided by the City does not meet state requirements or that the state requirements are deficient. Thus, they have not and cannot plead facts to support a failure to train or supervise claim. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381-82 (5th Cir. 2010); *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010); *Huong v. City of Port Arthur*, 961 F. Supp. 1003, 1007 (E.D. Tex. 1997).

Further, deliberate indifference in this context applies to the official policymaker. "Deliberate indifference is more than mere negligence." *Sanders-Burns*, 594 F.3d at 381. Deliberate indifference, in a failure to train or supervise context, generally requires at least a pattern of similar violations arising from training or supervision that is so clearly inadequate as to be obviously likely to result in a constitutional violation. *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003). Plaintiffs cite no pattern of similar alleged violations.

The "[p]rior instances must point to the specific violation in question; 'notice of a pattern of similar violations is required.'" *Valle v. City of Houston*, 613 F.3d 536, 548 (5th Cir. 2010). A claim requires that a policy maker be charged with actual or constructive knowledge of an official policy or custom of failing to adequately train. *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). Plaintiffs have failed to even reference or connect their claims with sufficient factual allegations of notice and failure to act.

C. Plaintiffs' Claims Against Sergeant Ruiz and Officer Benavides Under 42 U.S.C. § 1983 Should be Dismissed

1. Qualified Immunity Protects Sergeant Ruiz and Officer Benavides as they were doing their job

Even if Plaintiffs had alleged a custom, policy, or practice and established a violation of their constitutional rights, Plaintiffs cannot overcome Sergeant Ruiz and Officer Benavides' qualified immunity.

Qualified immunity shields government officials from civil liability for damages when they perform discretionary functions under color of state law. *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 284 (5th Cir. 2002); *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S. Ct. 2727, 2738 (1982). Qualified immunity protects all "but the plainly incompetent or those who knowingly violate the law." *DePree v. Saunders*, 588 F.3d 282, 287 (5th Cir. 2009). Courts apply a two-step analysis to determine whether a public official is entitled to qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 818 (2009). The first step considers whether the facts alleged by the plaintiff establish a violation of a "clearly established" constitutional right that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). The second step is "whether the defendant's conduct was objectively reasonable in light of the clearly established law at the time of the incident." *Davis v. McKinney*, 518 F.3d 304, 310 (5th Cir. 2008).

Here, Sergeant Ruiz and Officer Benavides raise the defense of qualified immunity and Plaintiffs must meet the heightened pleading requirement. Plaintiffs state that their Fourth and Fourteenth Amendment rights were violated after their children were removed without proper justification or authority, and without probable cause, exigency, or court order. (Dkt. 1, ¶ 48).

Plaintiffs have failed to plead or provide any factual allegation to overcome Sergeant Ruiz and Officer Benavides' qualified immunity defense or satisfy the heightened pleading requirement, and thus, this claim against Sergeant Ruiz and Officer Benavides should be dismissed.

2. No Constitutional Rights Violation

Plaintiffs' allegations that Defendants voluntarily collaborated, acted in concert, and maliciously conspired to violate their constitutional rights by removing the seven children from the Plaintiffs' care, custody, and control are without merit. (Dkt. 1, ¶ 49). Plaintiffs' unspecified Fourth and Fourteenth Amendment claims against Defendants are without any substantive reference and/or factual basis. As such and without more, these allegations fail to establish a *prima facie* case upon which any plausible relief would be warranted and must therefore be dismissed.

III. MOTION TO DISMISS UNDER FEDERAL RULE 12(b)(1)

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) allows a party to move to dismiss an action for lack of subject matter jurisdiction. FED. R. CIV. PRO. 12(B)(1). The Court must dismiss a cause of action for lack of subject matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The burden of establishing subject matter jurisdiction is on the party seeking to invoke it. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In deciding a motion to dismiss pursuant to Rule 12(b)(1), the Court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the Court's resolution of disputed facts. *Id*.

B. Plaintiffs' tort causes of action should be dismissed because the City, Sergeant Ruiz, and Officer Benavides are immune under Texas law and, therefore, the Court lacks subject matter jurisdiction

As a Texas home-rule city, the City enjoys governmental immunity from suit in the performance of its governmental functions unless that immunity has been waived by the Legislature in clear and unambiguous language. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 343-44 (Tex. 2006); Tex. Gov't Code § 311.034. Governmental immunity deprives a trial court of subject matter jurisdiction for suits against governmental units unless the government consents to suit. *Texas Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). The same immunity generally extends to Texas state officials who are sued in their official capacities. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (*quoting Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007). A plaintiff bears the burden to affirmatively demonstrate a trial court's jurisdiction by alleging a valid waiver of immunity, which may be either by a reference to a statute or by express legislative permission. *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

1. Plaintiffs' Intentional Infliction of Emotional Distress and Abuse of Process causes of action should be dismiss

Governmental entities and their employees acting in their official capacities are immune from suit absent a legislative waiver. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). The "tort" waiver is the Texas Tort Claims Act ("TTCA"), codified as Section 101.001 *et seq.* of the Texas Civil Practice and Remedies Code. TTCA provides a limited waiver of immunity for (1) injury caused by an employee's use of a motor-driven vehicle; (2) injury caused by a condition or use of tangible personal property; or (3) injury caused by a condition or use of real property. *See* TEX. CIV. PRAC. & REM. CODE § 101.021; *see* also *City of Houston v. Rushing*, 7 S.W.3d 909, 914 (Tex. App. – Houston [1st Dist.] 1999, pet. denied).

The Texas Supreme Court has held that all common-law tort theories alleged against a governmental unit and its employees are brought under the TTCA for purposes of section 101.106. *Mission Consol. Indep. School Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008). This is true whether or not immunity has been waived for any particular tort cause of action. *Franka v. Velasquez*, 332 S.W.3d 367, 379-80 (Tex. 2011).

The election of remedies doctrine in the TTCA mandates that a Plaintiff elect at the outset of his case whether to proceed against the governmental entity or the employee in his or her individual capacity. *City of Webster v. Myers*, 360 S.W.3d 51, 57 (Tex.App.-Houston [1st Dist.] 2011, pet. denied). "The legislature's apparent purpose in revising section 101.106 was 'to force a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable, thereby reducing the resources that the government and its employees must use in defending redundant litigation and alternative theories of recovery.'" *Id*. (citing *Garcia*, 253 S.W.3d at 657). The statute strongly favors dismissal of governmental employees. *Waxahachie Indep. Sch. Dist. v. Johnson*, 181 S.W.3d 781, 785 (Tex.App. - Waco 2005, pet. denied).

TTCA's election of remedies doctrine requires the "immediate" dismissal of individual employees if a tort suit is brought against both the governmental unit and employees of the governmental unit. Texas Civil Practices & Remedies Code § 101.106(e) states:

> If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

TEX. CIV. PRAC. & REM. CODE § 101.106. In this way, § 101.106(e) operates as an involuntary election to sue only the governmental entity when Plaintiff initially files against the governmental entity and an employee of the governmental entity. *See City of Houston v. Gov't Employee Insurance* Company, 403 S.W.3d 256, 262(Tex.App.-Houston [1st Dist.] 2011, pet. denied). Texas Civil Practices & Remedies Code further states,

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE § 101.106. Thus, Sergeant Ruiz and Officer Benavides are entitled to dismissal because (1) the suit is based on conduct within the general scope of their employment, and (2) the suit could have been brought against the City. Accordingly, Plaintiffs' Intentional Infliction of Emotional Distress and Abuse of Process causes of action against Sergeant Ruiz and Officer Benavides should be dismissed.

2. The City is immune from Plaintiff's Intentional Infliction of Emotional Distress and Abuse of Process causes of action

The TTCA does not waive immunity for a claim "arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities." TEX. CIV. PRAC. & REM. CODE § 101.057.

Plaintiff's causes of action—intentional infliction of emotional distress and abuse of process—are intentional torts for which immunity is not waived under the TTCA. TEX. CIV. PRAC. & REM. CODE § 101.057(2); *see also Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.) (intentional infliction of emotional distress); *Perry v. City of Houston*, No. 01–01–00077–CV, 2005 WL 995441 at *4 (Tex. App.—Houston [1st Dist.] Apr. 28, 2005, no pet.) (slander); *Rubins v. People*, No. 07–14–00291–CV, 2015 WL 3525114, at *1 (Tex. App.—Amarillo June 4, 2015, pet. denied) (mem. op.) (no waiver for intentional torts claims of malicious prosecution and abuse of process). As such, those causes of action against the City must therefore be dismissed for lack of subject matter jurisdiction.

IV. CONCLUSION

For the reasons stated above, Defendants City of Houston, Sergeant Robert Ruiz and Officer Roland Benavides pray that Plaintiffs' Complaint against them be dismissed with prejudice and for such other relief, at law and in equity, to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 8, 2017, a copy of the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification to the following attorney(s) of record:

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